FOR ARGUMENT

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No. 76-709

In the Supreme Court of the United States

OCTOBER TERM, 1977

EARL L. BUTZ, ET AL., PETITIONERS

v.

ARTHUR N. ECONOMOU, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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This memorandum is submitted, pursuant to this Court's permission, to discuss the jurisdiction of the district court to entertain this suit.

Respondent's amended complaint (Para. 1, App. 156-157) states:

> This proceeding is brought in part pursuant to Section 1331, 2201, 2202 of Title 28 of the United States Code and the relevant provisions of the Federal Tort Claims Act 28 U.S.C. 1291 ff; Section 1583 of Title 42 of the United States Code; Section 10(b) of the Administrative Procedure Act (5 USC 703); and the First and Fifth Amendments of the Constitution of the United States and such other Constitutional and Federal laws as may be relevant hereto.

Under *Bell* v. *Hood*, 327 U.S. 678, we believe that respondent properly invoked the jurisdiction of the district court under 28 U.S.C. 1331, which gives the district courts jurisdiction over civil actions where the matter in controversy "arises under the Constitution, laws, or treaties of the United States." None of the other statutory provisions relied upon, however, confers jurisdiction.[1]

1. In *Bell* v. *Hood*, the plaintiffs brought a suit for damages against agents of the Federal Bureau of Investigation, based upon the latters' alleged violation of the plaintiffs' rights under the Fourth and Fifth Amendments. The district court dismissed the suit for lack of jurisdiction on the ground that it did not arise "under the Constitution or laws of the United States" within the meaning of 28 U.S.C. (1940 ed.) 41(1), the predecessor of 28 U.S.C. 1331. The court of appeals affirmed on the same ground.

This Court reversed. It held that "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must

[1]Sections 2201 and 2202 of Title 28 are the Declaratory Judgment Act; this suit is not for declaratory judgment, but for damages (App. 161-162). The Federal Tort Claims Act, which is erroneously cited as 28 U.S.C. 1291 (which deals with the jurisdiction of the courts of appeals) and should be cited as 28 U.S.C. 1346 and 2672 *et seq.*, does not confer jurisdiction. It covers only suits against the United States, and this suit is against government officials personally. Section 1583 of Title 42 deals with the disposition of housing; if respondent intended to refer to 42 U.S.C. 1983, that Section does not avail him because it covers only suits against state and not against federal officials. Section 10(b) of the Administrative Procedure Act, now 5 U.S.C. 703, deals with judicial review of agency actions, and is similarly inapplicable.

entertain the suit" (327 U.S. at 681-682). The two possible exceptions were that "suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" (*id.* at 682-683). The Court noted that the legal issue in the case "is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments" (*id.* at 684), and that "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction" (*id.* at 685).

The Court also pointed out that

> jurisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction [*id.* at 682].

The Court reaffirmed this principle in *Wheeldin* v. *Wheeler*, 373 U.S. 647, 649.

2. *Bell* v. *Hood* controls the present case. Four of respondent's ten causes of action (the First, Third, Fourth and Fifth, App. 159-160) alleged that the petitioners' actions violated respondent's rights either under the First Amendment or to due process of law. As we have noted (Reply Br. 3, n. 1), the question whether there is a cause for action for violations of the First and Fifth Amendments, like the similar issue in *Bell* v. *Hood*, has not been definitively decided. The issues here, as in *Bell* v. *Hood*, are not "wholly insubstantial and frivolous," and the causes of action based upon alleged violations of those constitutional provisions are not "so patently without merit as to justify * * * the court's dismissal for want of jurisdiction" (*Bell* v. *Hood*, *supra*, 327 U.S. at 683). Accordingly, although it may subsequently be decided that a cause of action does not exist for violation of those constitutional provisions, the district court nevertheless had jurisdiction to entertain this suit.

3. If, as we contend, the district court had jurisdiction over the four causes of action in respondent's complaint alleging violation of his constitutional rights, it also had jurisdiction over the remaining nonconstitutional claims under the doctrine of pendent jurisdiction. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, cf. *Aldinger* v. *Howard*, 427 U.S. 1; *Moor* v. *County of Alameda*, 411 U.S. 693. Respondent's "state and federal claims * * * derive[d] from a common nucleus of operative fact" (*Gibbs*, *supra*, 383 U.S. at 725), namely, the action of the petitioners in initiating, prosecuting and deciding the administrative proceeding. "[C]onsidered without regard to their federal or state character, * * * [respondent's] claims are such that he would ordinarily be expected to try them all in one judicial proceeding" (*ibid.*). This being so, and "the federal issues" being substantial, "there is *power* in federal courts to hear the whole" (*ibid.*; emphasis in original, footnote omitted).

4. Since the district court had jurisdiction to entertain this suit, it was within that court's discretion to decide that the defendants were immune from suit without first deciding whether the complaint stated a cause of action. Petitioners moved to dismiss on the former ground (App. 163). The district court was not required on its own motion to decide the sufficiency of the complaint before passing upon petitioners' motion to dismiss on a different ground. If the court of appeals' judgment remanding the case is affirmed, petitioners could then move to dismiss the complaint for failure to state a claim upon which relief can be granted. Rules 12(b)(6) and 12(h)(2), Federal Rules of Civil Procedure.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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